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United States Bankruptcy Court
Southern District of Texas
FILED

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Michael N. Milby, Clerk

IN THE
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

* * * * *

Ex parte Yolanda Saldivar

* * * * *

Applicant in the Appeal Number 14-96-00010-CR
The Court of Appeals for the
Fourteenth District of Texas
Out of the 214th Judicial District Court
Venue Transferred to the 228th Judicial District Court
Trial Court Cause No. 704424

* * * * *

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR
PETITION FOR WRIT OF HABEAS CORPUS

* * * * *

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<u>Ground for Review No.1</u>	22-31
The court of appeals unreasonably applied clearly established Federal Law, as determined by the United States Supreme Court pursuant to <u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2nd 69 (1986), in failing to recognize Applicant's valid challenge and determining that trial counsel failed to timely preserve the complaint. The State exercised its peremptory strikes in a purposefully prejudicial manner and failed to provide a racially neutral reason for doing so.	
<u>Ground of Review No. 2</u>	31-47
The appellate court unreasonably applied clearly established Federal Law in holding that Applicant's due process Sixth Amendment right of effective confrontation and cross-examination was not violated. The Applicant was harmed when the court of appeals upheld the trial court's failure to grant the motion for new trial based on the newly discovered, wrongfully withheld, impeachment evidence pertaining to one of the State's main witnesses.	
<u>Ground of Review No. 3</u>	47-60
The court of appeals unreasonably applied the law interpreting the Fifth and Sixth Amendments to the United States Constitution, in holding that the trial court did not err in failing to suppress the Applicant's	

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written confession obtained after invocation of rights. The Appellate court erroneously reasoned that the Applicant's request to speak with an attorney was not unambiguous, and that she was not in custody at the time she made the request.

Ground of Review No. 4

60-90

General

The court of appeals unreasonably applied clearly established Federal Law, as determined by the United States Supreme Court in overruling Applicant's point of error that she suffered harm from the failure of the trial court to instruct the jury about the limited purpose for which evidence of extraneous offenses was admitted.

The court of appeals erred by failing to discern the difference among a preserved charge harm analysis, unpreserved charge harm analysis, and a Rule 44 "beyond a reasonable doubt" harm analysis.

Specific

- A) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in admitting evidence of extraneous misconduct despite the State's failure to give adequate, nonspecific, timely notice under Rule 404(b).
- B) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court abused its discretion in admitting unfounded prejudicial evidence of extraneous misconduct during the guilt/innocence phase of the trial.
- C) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in admitting harmful hearsay evidence regarding extraneous misconduct in violation of Applicant's right to confront and cross-examine witnesses against her.
- D) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in failing to give a limiting instruction regarding extraneous misconduct, as required by Rule 105(a).

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<p>The Appellate court unreasonably applied clearly established Federal Law in holding that the prosecutor's comments did not amount to an impermissible comment on the Applicant's failure to testify, in violation of the Applicant's rights under the Fifth Amendment of the United States Constitution.</p>	
<u>Ground of Review No. 6</u>	97-114
<p>The court of appeals erred in overruling Applicant's point of error wherein she asserted she suffered harm when the trial court denied the requested punishment instruction of sudden passion, pursuant to Texas Penal Code, Title 5, Chapter 19.02(2) and Chapter 19.02(d), in violation of the Sixth and Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Texas Constitution.</p>	
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REQUEST FOR HABEAS CORPUS HEARING

Applicant requests a hearing on her application for writ of habeas corpus, to fully develop the issues therein.

CONFINEMENT AND RESTRAINT

Applicant is being unlawfully confined and restrained of her liberty by Brad Livingston, acting in his official capacity as the director of the Texas Department of Criminal Justice, Institutional Division.

STATEMENT OF THE FACTS, CASE,

PROCEDURAL HISTORY, AND JURISDICTION

The Applicant was indicted by the Nueces County Grand Jury of the offense of murder in Trial Court No. 95-CR-1787-F in the 214th District Court, however, after a change of venue was granted, the case was transferred to Harris County. The Applicant entered a plea of not guilty in the 228th Judicial District Court, Judge Westergren, in cause number 704424. The jury found the Applicant guilty and assessed punishment of life in the Texas Department of Corrections, Institutional Division.

A hearing was subsequently held on the timely filed motion for new trial which was denied, and timely notice of appeal given. After briefs and oral argument, the 14th Court of Appeals rendered an opinion affirming the conviction and sentence on October 1, 1998. The motion for rehearing was overruled on December 10, 1998,

the Petition for Discretionary Review being filed on March 7, 1999. The Petition for Discretionary Review was refused on August 18, 1999 and the 14th Court of Appeals issued the Mandate back to the 214th Judicial District Court, the court of original jurisdiction on September 22, 1999. All appellate remedies having been exhausted, Petitioner asserts that her Post Conviction Writ of Habeas Corpus was due on September 25, 2000. Applicant filed an application for writ of habeas corpus, via the United States mail by certified mail, return receipt request #Z554 233 720, with the convicting court on September 23, 2000 and was received on September 26, 2000 by D. Rellu, district clerk. To this date, the trial court has failed to take action upon Applicant's application for writ of habeas corpus, and Applicant has filed, contemporaneously with the filing of this application for writ of habeas corpus with the Southern District of Texas, a request for a writ of mandamus from the Texas Court of Criminal Appeals so as to comply with State exhaustion rules. As the Applicant is at one year to the day for the filing of the 2254 Writ and the State Writ has not yet been denied, the Applicant respectfully requests the permission to file the 2254 Writ before the 11.07 is denied so as to not abrogate any of her continuing appellate rights, pursuant to United States Code, Title 28, Chapter 153, Section 2254 (B)(b)(ii).

GROUND FOR REVIEW

Ground for Review No.1

The court of appeals erred in overruling the Applicant's point of error that she suffered harm by the trial court failing to recognize Applicant's valid challenge pursuant to Batson v. Kentucky. The State exercised its peremptory strikes in a purposefully prejudicial manner and failed to provide a racially neutral reason for doing so, and the Texas Court of Appeals, Fourteenth District erred in opining that trial counsel had failed to properly preserve the challenge.

Ground for Review No.2

The Texas Court of Appeals, Fourteenth District erred in overruling Applicant's point of error that she was harmed by the trial court denying Applicant her due process Sixth Amendment right of effective confrontation and cross-examination. The Court of Appeals erred in overruling the trial court's failure to grant the motion for new trial based on the newly discovered impeachment evidence pertaining to the State's main witness, that the State had wrongfully failed to disclose to Applicant.

Ground of Review No.3

The court of appeals erred in overruling Applicant's point of error that she was harmed when the trial court erred in failing to suppress the Applicant's written confession obtained after invocation of rights.

Ground of Review No.4

General

The court of appeals erred in overruling Applicant's point

of error that she suffered harm from the failure of the trial court to instruct the jury about the limited purpose for which evidence of extraneous offenses was admitted.

The court of appeals erred by failing to discern the difference among a preserved charge harm analysis, unpreserved charge harm analysis, and a Rule 44 "beyond a reasonable doubt" harm analysis.

Specific

- A) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in admitting evidence of extraneous misconduct despite the State's failure to give adequate, nonspecific, timely notice under Rule 404(b).
- B) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court abused its discretion in admitting unfounded prejudicial evidence of extraneous misconduct during the guilt innocence phase of the trial.
- C) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in admitting harmful hearsay evidence regarding extraneous misconduct in violation of Applicant's right to confront and cross-examine witnesses against her.
- D) The court of appeals erred in overruling the Applicant's point of error that she was harmed when the trial court erred in failing to give a limiting instruction regarding extraneous misconduct, as required by Rule 105(a).

Ground of Review No.5

The court of appeals erred in overruling Applicant's point

of error asserting she was harmed by the trial court's failure to grant a mistrial based upon the improper prosecutorial comment on her failure to testify.

Ground of Review No.6

The court of appeals erred in overruling Applicant's point of error wherein she asserted she suffered harm when the trial court denied the requested punishment instruction of sudden passion, pursuant to Texas Penal Code, Title 5, Chapter 19.02(2) and Chapter 19.02(d), in violation of the Sixth and Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Texas Constitution.

REASONS FOR REVIEW

The Applicant respectfully petitions this Honorable Court to grant this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, in that the Texas Court of Appeals, Fourteenth District's ruling was contrary to, and involved the unreasonable application of clearly established Federal Law, as determined by the United States Supreme Court. Applicant asserts that she therefore suffered harm of constitutional proportions in the trial court which the Court of Appeals failed to remedy. Applicant further asserts her Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution.

Ground for Review No.1

The court of appeals unreasonably applied clearly established Federal Law, as determined by the United States Supreme Court pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2nd 69 (1986), in failing to recognize Applicant's valid challenge and in determining that trial counsel failed to timely preserve the complaint. The State exercised its peremptory strikes in a purposefully prejudicial manner and failed to provide a racially neutral reason for doing so.

Facts Pertaining to Ground of Review No.1

It is the Applicant's assertion that the defense counsel timely pursued her Batson objection. (Rec.Ex.#1). The State then failed to put forth a racially neutral reason for striking all black venire persons relying upon their belief that the challenge was untimely. (Rec.Ex.#2). The opinion of the Fourteenth Court stated: "After both parties exercised their peremptory challenges but prior to seating the jury, Applicant's trial counsel requested an opportunity to make a record regarding the trial court's denial of his request for additional peremptory challenges. Applicant's trial counsel said, 'I need to make a record with regard to that before they are seated with regard to the challenges that you denied me. We had to settle on this jury. I can make that record after you seat them as though I made it now?' The trial judge responded, 'That's correct'". Saldivar v. State, 980 S.W. 2nd 473, 475 (Tex.App.--Houston [14th Dist.] 1999). The opinion went on to discuss: "After a brief discussion as to whether the objection was preserved, the trial court postponed argument on the motion until the

next morning." Id.

The following day, Applicant's trial counsel reminded the trial court that he asked to make objections to the impaneling of the jury and that the court permitted him to do so after the jury was seated. Once again, a discussion ensued regarding when Applicant's trial counsel made the Batson challenge and whether the trial court permitted him to make objections to the impaneling of the jury after the jury was seated. Applicant's trial counsel finally admitted, "Your Honor, let me say this: I had no inclination as to pass the challenge because I hadn't seen the color of the faces; and then, as they were seated, at the time they did, I knew that I should do that, and I made it." Without overtly stating that the objection was preserved, the trial judge acted as if it was by allowing Applicant's trial counsel to renew his Batson challenge. The prosecutor once again objected, stating the challenge was untimely. When asked, the prosecutor declined the opportunity to state the reasons for its challenged strikes and objected that Applicant had not met her burden to establish a prima facie case. This is, of course, not something that the State is allowed to make a determination of. Clearly, this is the province of the trial court. The trial court, in asking the State to assert their reasons for their strikes, obviously believed the Applicant had established a prima facie case. After hearing argument, the trial court denied Applicant's motion to quash the panel. Id. at 484.

ARGUMENTS AND AUTHORITIES

It is now well accepted that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits

the State from exercising its peremptory challenges in a purposefully discriminatory manner. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); see also Keeton v. State, 749 S.W. 2d 861 (Tex.Cr.App. 1988). Additionally, the Equal Protection Clause prohibits the exercise of peremptory challenges based on race.

A trial court faced with a challenge under Batson must employ a three-step analysis to determine whether or not the State's exercise of its peremptory strikes to exclude members of a certain race is purposefully discriminatory. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712. First, the defendant must make a prima facie showing that the State has used its peremptory strikes in a racially motivated manner. Purkett v. Elem, 514 U.S. 765, 767 (1995)(per curiam). Next, the burden of production shifts to the State, and the State is required to articulate a clear, specific, legitimate and racially neutral reason for exercising the strike. Id. Finally, the defendant must offer reasons why the State's articulated purpose in exercising its strikes is a pretext. Id. If the defendant is able to show that the State's reasons for striking jurors of a particular racial group was merely a pretext to allow the State to remove members of that group, the trial court should grant the defendant's Batson challenge and order a new jury panel. If not, the trial goes on with the same jury.

On review, the appellate court must determine whether the trial court's findings are clearly erroneous. The lower court's determination that a party has used peremptory strikes in a discriminatory manner is a finding of fact and thus cannot be overturned by the reviewing court absent clear error. Hernandez v.

New York, 500 U.S. 352, 111 S.Ct. 1859, 1871, 114 L.Ed.2d 395 (1991).

To determine whether the fact-finder's decision is "clearly erroneous" appellate courts look to the record to see if they are left with the "definitive and firm conviction that a mistake has been committed."

United States v. Fernandez, 887 F.2d 564, 567 (5th Cir. 1989) citing and quoting Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573, 105 S.Ct. 1504, 1511; 84 L.Ed.2d 518 (1985).

In Saldivar, the trial court did not conduct an analysis pursuant to the three prong test enunciated in Batson and established as Federal Law. Additionally, the trial court clearly ruled that the objection of the trial counsel was timely, because the trial court got to the second prong of the analysis-it asked the State to articulate an explanation for the State's use of its peremptory strikes.

The case law reviewed in the Batson opinion discussed where the objection is untimely. In Saldivar, this is not so obvious. Defense counsel could have, and did, timely make the objection; however, the objection came at the end of a long voir dire session and the trial counsel asked the trial court if it desired to pursue this issue in the morning. The judge gratefully so gave permission. (Rec.Ex.#3). In every other situation where an appellate court reviews a trial court's decision, wide latitude is given to these decisions. No decision of a trial court will be reversed in such a situation unless it is clear that an abuse of discretion has occurred. The trial court clearly viewed the objection as timely. This decision should not have been disturbed by the Fourteenth Court.

In habeas proceedings in federal courts, the factual findings

of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U.S.C. §2254(d); See Marshall v. Lonberger, 459 U.S. 422, 432, 74 L.Ed.2d 646, 103 S.Ct. 843 (1983). The Batson court explained "that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal...." Since the trial judge's finding, in the context under consideration here turn largely on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Anderson v. Bessemer City, 470 U.S. 564, 575-76, 84 L.Ed.2d 518, 105 S.Ct. 1504.

The judge, in the instant case, made no factual findings in compliance with the three pronged test of Batson. Indeed, the appellate court's review of the trial court ruling on the Batson challenge is contrary to clearly established Federal Law, and involved the unreasonable application of such law. It hardly seems reasonable for the appellate court to decide that the trial court's decision that trial counsel would be allowed to preserve the Batson challenge at a later time was erroneous and wrong, thus denying this important issue on appeal. It can only be argued that the Applicant's Sixth and Fourteenth Amendment rights to due process and a fair trial were unduly prejudiced by the appellate court's decision to excuse this important issue under the wrongful guise of abuse of discretion and improperly preserved evidence.

1. Prima facie case of purposeful discrimination

To establish a prima facie case of purposeful discrimination

in selection of the jury panel, a defendant must show that (1) he belongs to a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race; and (3) the facts and circumstances raise an inference that the prosecutor used peremptory strikes to exclude venire members because of their race. Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1722-23, 90 L.Ed at 69.

The Applicant made a prima facie showing of purposeful discrimination in the selection of the jury panel. The trial court recognized that the Applicant made a prima facie showing of purposeful discrimination and heard the Applicant's Batson challenge.

2. The State must provide a racially neutral explanation for its challenge of particular jurors

After the defendant makes a prima facie showing that the State has exhibited purposeful discrimination in its exercise of peremptory strikes, the burden shifts to the State to offer a racially neutral explanation for its use of these peremptory strikes. Batson, 476 U.S. at 96-97, 106 S.Ct. at 1722-23. The State's burden at this particular point has changed in the past few years. Batson and its progeny have required the State to provide a clear, specific, legitimate, and racially neutral reason for exercising the strike or strikes. This showing need not rise to the level of a challenge for cause, see Keeton v. State, 749 S.W. 2nd at 867-68, but the well reasoned requirement was that the State articulate a legitimate reason for its exercise of presumptively purposeful discrimination in its use of peremptory strikes.

The Texas Court of Criminal Appeals established a set of factors it deemed useful in making a determination whether the State's proffered race-neutral reasons are supported by the record as well as the trial court's findings. The factors were: The reason given for the peremptory challenge is not related to the facts in the case; There was a lack of questioning to the challenged juror or a lack of meaningful questions; Disparate treatment, i.e., persons with the same or similar characteristics as the challenged juror were not struck; Disparate examination of members of the venire, i.e., questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; An explanation based on a group bias where the group trait is not shown to apply to the juror specifically. Williams v. Texas, 804 S.W. 2nd 95 (Tx.Cr.App. 1991); Whitsey v. State, 796 S.W. 2nd at 713-714.

As is obvious from the record, the State provided no explanation for its use of racially motivated peremptory strikes, ignoring the fact that the trial court had decided to hear the challenge. In reviewing the record, it becomes apparent that the trial court's main consideration was leaving for the evening. (Rec.Ex.#4). While the Applicant respectfully understands the need for judicial expediency, and has no desire to inconvenience potential jury members, such a consideration should not be in the forefront of the trial court's mind when it is determining whether or not the defendant's constitutional right to a fair and impartial trial has been compromised. Rather, the trial court should have been focusing upon the State's lack of stated reasons behind its prejudicial exercise of its peremptory challenges.

3. The defendant offers reasons why the State's explanation is a mere pretext.

The Fourteenth Court of Appeals based its determination upon the fact that case law suggests that the error was not preserved. This is clearly an incorrect statement of the law under the abuse of discretion standard applied to all trial courts in reviewing the entire record. While the Fourteenth Court failed to discuss the imperatives of Purkett, it seems necessary to discuss them at this juncture, in light of the foregoing discussion. The Fourteenth Court, though erroneously not employing Purkett, clearly misinterprets the requirements of Purkett. The Fourteenth Court seemingly interpreted Purkett to mean that the trial court could accept the State's explanation, or lack of one, as race neutral, without employing the third prong, or any prong of the Batson analysis. In essence, the trial court did not afford the Applicant the opportunity to rebut the State's reasoning as it did not require the State to put forth any reasoning, even though it had decided to hear the challenge. The Fourteenth Court compounded the error by not fully analyzing the trial court's decision under Batson. Purkett stands for the proposition that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral". Purkett, 514 U.S. at 767. The fact that the State decides to not offer any explanation whatsoever does not mean that Purkett is somehow met, or in the alternative, is inapplicable. It is all the more so. "The inquiry does not terminate....even if the party opposing the peremptory challenge offers a 'silly or superstitious' explanation, so long as

the explanation is race neutral." Purkett, 514 U.S. at 768, 115 S.Ct. at 1771 (non-relevant portions omitted). This becomes all the more important when the State offers no explanation. At the third step of the process, the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. Id. It is at this stage that any implausible justifications for striking potential jurors "may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination." Id. Applicant is unable to put forth any rational explanation why the trial court would allow the hearing on the Batson challenge, and then completely ignore all the legal requirements there under. Such action clearly breaks from the requirements of clearly established Federal Law.

There is no question that the Applicant made a prima facie showing of a purposefully prejudicial exercise of the State's peremptory strikes. The State made no offer of a racially neutral explanation. The State erroneously exercised its peremptory strikes, then relied on an excuse that it was not timely preserved even though the trial court allowed the hearing on the challenge. As the State may try to argue, this was not a bill of exception for the judge had not yet made a ruling on the challenge. The Fourteenth Court of Appeals erred in not completing the Batson analysis, and the error cannot stand. To allow the Fourteenth Court's erroneous analysis to stand would work to eviscerate Batson, is contrary to the holding of Purkett, and would be an endorsement of the Fourteenth Court's

disregard of the clearly established Federal Law of Batson and its progeny.

Ground of Review No. 2

The appellate court unreasonably applied clearly established Federal Law in holding that Applicant's due process Sixth Amendment right of effective confrontation and cross-examination was not violated. The Applicant was harmed when the court of appeals upheld the trial court's failure to grant the motion for new trial based on the newly discovered, wrongfully withheld, impeachment evidence pertaining to one of the State's main witnesses.

Facts Pertaining to Grounds of Review No. 2

Applicant filed and obtained favorable pretrial rulings on her Motion to Discover Criminal Records of Witnesses (Rec.Ex.#5) and on her Motion to Produce Exculpatory and Mitigating Evidence, (Rec.Ex.#5). In response, the District Attorney's Office tendered to the Court for an in camera inspection its record search indicating no criminal history for Norma Martinez, (Rec.Ex.#6). The defense was provided no records indicating Martinez had a criminal history, (Rec.Ex.#7). The defense contended the shooting was involuntary. Norma Martinez, an employee of the hotel where the shooting occurred, gave two written statements to the police following the incident, (Rec.Ex.#8). At the time of the shooting, Martinez was standing next to fellow-employee Trinidad Espinoza, (Rec.Ex.#9). For the first time at trial, only Martinez claimed she heard applicant yell "bitch" as Applicant chased the complainant with a gun, (Rec.Ex.#10). Espinoza heard no such insult, (Rec.Ex.#11). Following the conviction, Applicant filed her

motion for a new trial claiming newly discovered impeachment evidence consisting of Martinez's criminal history. (C.R.p. 165). At the motion for new trial hearing, defense attorney Arnold Garcia testified that after the trial, he learned for the first time, Martinez was a convicted thief, (Rec.Ex.#12). At Garcia's request, the Nueces County Sheriff's Department located a criminal history using Ms. Martinez's first name and the date of birth as they appeared in DX 4 (Martinez's statement) and DX 5 (the criminal history submitted to the Court for pretrial in camera inspection), (Rec.Ex.#12).

At the time of trial, Martinez had one prior theft conviction based on the aggregation of two separate incidents of theft in Cause No. 90-0572-3, and one pending theft charge with an active capias warrant for failure to appear in Cause No. 90-5360-3. She pleaded guilty in Cause No. 90-5360-3 shortly after this trial, (Rec.Ex.#13). The opinion of the Fourteenth Court erroneously opined that although the State breached its duty to disclose impeachment evidence by failing to disclose State witness' criminal history, this criminal history was not material to the outcome of a murder prosecution, and thus, the State's failure to disclose the criminal history did not violate Applicant's due process rights. Saldivar, 980 S.W. 2nd at 486.

ARGUMENTS AND AUTHORITIES

Article 2.01 of the Texas Code of Criminal Procedure provides in pertinent part:

It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.

They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused. Tex.Code Crim Proc.Ann. art. 2.01 (West Supp. 2002).

The State's duty to disclose evidence favorable to the defendant is an extension of Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). In Mooney, the Supreme Court established the general rule that a prosecutor's knowing use of perjured testimony violated the defendant's right to due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Mooney, 294 U.S. at 112, 55 S.Ct. at 342. See also, Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2L.Ed.2nd 9 (1957), the Supreme Court expanded the rule in Mooney and held the prosecutor's knowing failure to correct a witness' perjured testimony denied the defendant due process. The Court noted the prosecution's failure to correct a witness' perjured testimony, which would have supported the defendant's theory of mitigating circumstances, prevented the defendant from effectively corroborating his own defensive theory. Alcorta, 355 U.S. at 31, 78 S.Ct. at 105. The Supreme Court expanded the prosecutorial duty to correct perjured testimony to include perjured testimony which related to the witness' credibility and not just the facts of the case. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2nd 1217 (1959). In Napue, the Court held a prosecutor's knowing failure to correct perjured testimony which related to the witness' credibility violated the defendant's right to due process. Napue, 360 U.S. at 269, 79 S.Ct.

at 1177.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2nd 215 (1963), the Supreme Court recognized the underlying principle of Mooney was not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. Brady, 373 U.S. at 87, 83 S.Ct. at 1197.

Because Brady was aimed at ensuring that an accused receives a fair trial rather than punishing the prosecutor for failing to disclose favorable evidence, the prosecution's obligation to disclose is not measured by the moral culpability, or the willfulness of the prosecutor. United States v. Agurs, 427 U.S. 97, 100, n. 17, 96 S.Ct. 2392, 2400, n. 17, 49 L.Ed. 2nd 342 (1976); U.S. ex rel. Smith v. Fairman, 769 F.2d 386 at 392 (7th Cir. 1985). In Brady cases, the good or bad faith of the State is irrelevant for due process purposes. Thomas, 841 S.W. 2nd at 402.

The Supreme Court in Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed. 2nd 706 (1972), interpreted Brady as establishing a three prong test for when nondisclosure of evidence favorable to the accused violates the Due Process Clause. Under this test, the accused had to establish: 1) suppression by the prosecution after a request by the defense; 2) the evidence's favorable character for the defense; and 3) the materiality of the evidence. Moore, 408 U.S. at 797 795, 92 S.Ct. at 2568.

Although there is no duty to provide defense counsel with